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## The Right to Cross-Examine Physicians in Social Security Disability Cases

Victor G. Rosenblum

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# The Right to Cross-Examine Physicians in Social Security Disability Cases\*

Victor G. Rosenblum\*\*

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## I. INTRODUCTION

In the 1971 United States Supreme Court decision *Richardson v. Perales*,<sup>1</sup> Justice Blackmun couched the majority ruling on the right to cross-examine reporting physicians in social security disability claim hearings in an elaborate, complex sentence that perplexes analysts of its blackletter content and spawns conflicting interpretations of its subsequent bearing on cases in which cross-examination is requested. In a triumph of verbosity over clarity, Justice Blackmun stated:

We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his

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\* Victor G. Rosenblum, *The Right to Cross-Examine Physicians in Social Security Disability Cases*, 26 FLA. ST. U. L. REV. 1049 (1999) (Reprinted here with permission from Florida State University Law Review).

\*\* Professor of Law, Northwestern University School of Law. A.B., Columbia University, 1945; LL.B., Columbia University, 1949; Ph.D., University of California at Berkeley, 1953. I am indebted to my research assistant, Alex Ramirez, for his immensely helpful contributions and initiatives in preparing this Article.

1. 402 U.S. 389 (1971).

area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.<sup>2</sup>

On the one hand, Justice Blackmun referred to the cross-examination of the reporting physician as the claimant's "right." This suggests that the only precondition to obtaining a subpoena to cross-examine a reporting physician is to duly request it, which the claimant in *Perales* did not do. On the other hand, Justice Blackmun, in his "thereby" clause, states that the plaintiff merely has an "opportunity" for cross-examination. This statement seems to suggest that the claimant's "right" to cross-examination is not absolute. Does a claimant's "right" trump his "opportunity," or does Justice Blackmun's convoluted statement mean that a claimant's "opportunity" for cross-examination modifies or supplants his "right?"

In the aftermath of the *Perales* decision, federal appellate courts initially acted compatibly with the view that cross-examination, once duly requested, was a right.<sup>3</sup> But in 1996, the Sixth Circuit, in *Calvin v. Chater*<sup>4</sup> and *Flatford v. Chater*,<sup>5</sup> upheld the Social Security Administration's (SSA's) rejection of the claimants' requests for cross-examination.<sup>6</sup> The Sixth Circuit maintained that the Su-

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2. *Id.* at 402.

3. *See, e.g.,* Lidy v. Sullivan, 911 F.2d 1075 (5th Cir. 1990) (finding that a claimant has the right to cross-examine the physician if a subpoena had been requested); Coffin v. Sullivan, 895 F.2d 1206 (8th Cir. 1990) (stating that a claimant must be given the opportunity to cross-examine a witness who submits a report); Townley v. Heckler, 748 F.2d 109 (2d Cir. 1984) (finding a due process violation because the claimant was not permitted to cross-examine an expert after requesting such permission); Gullo v. Califano, 609 F.2d 649 (2d Cir. 1979) (finding a due process violation because the hearing judge substantially relied on the doctor's report and the claimant was denied the right to cross-examine the doctor); Figueroa v. Secretary of Health, Educ., & Welfare, 585 F.2d 551 (1st Cir. 1978) (stating that even though the claimant made no request to cross-examine, the Administrative Law Judge (ALJ) should, out of fairness, ask an unrepresented claimant if he has any questions for the witness).

4. 73 F.3d 87 (6th Cir.1996).

5. 93 F.3d 1296 (6th Cir. 1996).

6. *See Calvin*, 73 F.3d at 92; *Flatford*, 93 F.3d at 1300.

preme Court's formulation of the *Perales* rule did not create an absolute right to cross-examination once requested.<sup>7</sup> In the June 1998 decision *Yancey v. Apfel*,<sup>8</sup> the Second Circuit followed the Sixth Circuit's interpretation of the *Perales* rule. In *Yancey*, the court concluded that the implementation of the claimant's opportunity for cross-examination is properly contingent upon the claimant's showing that a subpoena and cross-examination are necessary to the full presentation of a case.<sup>9</sup>

This Article examines the alternative readings and rationales of *Perales* regarding the cross-examination of reporting physicians in social security disability claim hearings. First, Part II compares the Sixth and Second Circuit's interpretation of the *Perales* rule, which supports the SSA's regulation and interpretation, to the Fifth Circuit's interpretation, which explicitly proclaims cross-examination, once duly requested, to be an absolute right. Part III questions whether the *Perales* Court's declaration that the SSA is "an [impartial] adjudicator and not . . . an advocate or adversary"<sup>10</sup> remains empirically valid. Part IV discusses the SSA's recent assertions of management prerogatives that constrict the decisional independence of the SSA's Administrative Law Judges (ALJs). Part V questions the Sixth and Second Circuit's draconian predictions that physicians will be unwilling to participate in social security proceedings if they are required to submit to cross-examination. Currently, this prediction is conjectural and unaccompanied by authoritative data. Finally, Part VI concludes that cross-examination of reporting physicians in SSA hearings is an absolute right. I would not object, however, to a reformulation of the SSA's regulation that would make granting claimants' requests for cross-examination of physicians mandatory, unless the ALJ finds that such cross-examination would be superfluous or dysfunctional.

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7. See *Calvin*, 73 F.3d at 92; *Flatford*, 93 F.3d at 1300.

8. 145 F.3d 106 (2d Cir. 1998).

9. See *id.* at 113 (finding that issuing subpoenas in social security cases is governed by 20 C.F.R. § 404.950(d)(1)). The Social Security Administration's regulations provide that "[w]hen it is reasonably necessary for the full presentation of a case, an administrative law judge . . . may, . . . at the request of a party, issue subpoenas for the appearance and testimony of witnesses . . ." 20 C.F.R. § 404.950 (d)(1)(1998).

10. *Richardson v. Perales*, 402 U.S. 389, 403 (1971).

## II. JUDICIAL CHALLENGES TO CROSS-EXAMINATION AS AN ABSOLUTE RIGHT

### A. *The Sixth Circuit*

Two 1996 Sixth Circuit decisions challenge the *Perales* interpretation supporting the notion that claimants for Social Security Income benefits have an absolute right to cross-examine reporting physicians. First, in *Calvin v. Chater*,<sup>11</sup> a unanimous panel reversed the district court's ruling that the claimant had an absolute right to subpoena and cross-examine a physician who provided a pre-hearing report.<sup>12</sup> Instead, the court insisted that a claimant's opportunity to subpoena and cross-examine a physician would be granted only upon a timely showing that both are "reasonably necessary for full presentation of the case."<sup>13</sup> I will refer to this treatment as the "Calvin Approach." The panel conjectured that if the physician had been subpoenaed to testify at the hearing that led to the denial of the petitioner's claim, it was unlikely that the physician would have recalled the medical examination which took place more than two years before the hearing.<sup>14</sup> Based on this reasoning, the court found that the physician's testimony was not reasonably necessary.<sup>15</sup> Moreover, despite the principle that due process requires that a claimant be given an opportunity to cross-examine the individuals who submit reports, the court found that an agency charged with issuing regulations is not "constitutionally precluded from prescribing reasonable and proper requirements."<sup>16</sup>

Seven months after the *Calvin* decision, another Sixth Circuit panel, comprised of Judges Martin, Batchelder, and Oliver, solidified and expanded the Calvin Approach and applied it to doctors who provide post-hearing evidence.<sup>17</sup> Convinced that precisely drafted interrogatories would have met the claimant's need for any additional information, the panel concluded that the ALJ's decision denying the claimant a subpoena was not an abuse of the

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11. 73 F.3d 87 (6th Cir. 1996).

12. *See id.* at 88.

13. *Id.* at 91.

14. *See id.* at 92.

15. *See id.* at 92-94.

16. *Id.* at 93. The panel concluded its ode to SSA prescription of preconditions to subpoenas and cross-examination with "[s]ee generally *Mathews v. Eldridge*, 424 U.S. 319 . . . (1976)." The often-invoked *Mathews* criteria for determining what process is due are considered *infra* note 39.

17. *See Flatford v. Chater*, 93 F.3d 1296, 1306 (6th Cir. 1996).

ALJ's discretion.<sup>18</sup> The panel also rejected the petitioner's argument that the Calvin Approach violates a claimant's right to procedural due process.<sup>19</sup>

Notwithstanding the definitiveness of its conclusion, the panel acknowledged that deciding whether the ALJ abused his discretion in denying cross-examination was a "close call" because the ALJ asked for the doctor's testimony after the hearing.<sup>20</sup> The panel also recognized that a heightened danger exists when evidence is gathered post-hearing because the claimant may not have the opportunity to cross-examine the physician.<sup>21</sup> Finally, the panel acknowledged that the inconvenience or expense of traveling to the hearing site and additional time may discourage the claimant from requesting a supplemental hearing.<sup>22</sup>

Despite the existing dangers, the court maintained that a supplemental hearing was not necessary even though the doctor failed to satisfactorily answer a "minimal number of questions."<sup>23</sup> Although an ALJ's withholding of interrogatories requested by a claimant could raise concerns, the court reasoned that enough information was obtained from the doctor through several sets of interrogatories.<sup>24</sup> Thus, the court concluded that the ALJ had not abused his discretion in denying the subpoena.<sup>25</sup> In coming to this conclusion, the court reasoned that the ALJ remained an impartial decision maker throughout the proceeding and had not failed in aiding the claimant in the full development of his case.<sup>26</sup> Furthermore, the court disregarded the questions to which the doctor was unresponsive because these questions were few in number and were poorly drafted.<sup>27</sup>

The *Flatford* panel put a premium on *Perales's* reference to "opportunity" for cross-examination and proceeded to hone "opportunity" semantically and situationally until it was reduced to a privilege to petition the ALJ for an exercise of the latter's discretion. Thus, the panel ruled that courts must uphold ALJ exercises

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18. See *id.* at 1307.

19. See *id.*

20. *Id.*

21. See *id.*

22. See *id.*

23. *Id.*

24. See *id.*

25. See *id.*

26. See *id.*

27. See *id.*

of discretion regarding physician cross-examination absent a claimant's proof of bias or an abandonment of impartial decision making.<sup>28</sup>

On the other hand, the panel discounted *Perales's* reference to a claimant's "right" to subpoena and cross-examine a physician because the Supreme Court did not discuss whether this right was absolute or limited. The panel found that the *Perales* Court's language concerning this "right" was merely dicta.<sup>29</sup> The remaining question is whether the Sixth Circuit transmuted "opportunity" and "right" from enforceable mandates to gummy homilies or from entitlements to dicta.

### B. The Second Circuit

In a tightly reasoned departure from the thrust of the Second Circuit's previous rulings on the cross-examination of physicians, the Second Circuit endorsed and allied itself with the Sixth Circuit's conclusion in *Flatford*.<sup>30</sup> In *Yancey v. Apfel*,<sup>31</sup> the panel, comprised of Judges Miner, Parker, and Dearie, ruled unanimously that a claimant does not have an absolute due process right to subpoena a reporting physician and that the ALJ did not abuse his discretion in refusing the claimant a subpoena to cross-examine the physician.<sup>32</sup>

Prior to *Yancey*, the Second Circuit explicitly ruled that ALJs violated the Due Process Clause by relying on evidence the claimant had not been allowed to challenge or rebut.<sup>33</sup> The Second Circuit swerved from this approach by finding that the issue of whether a disability claimant has an absolute right to subpoena a reporting physician was an issue of first impression in the Second

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28. *See id.*

29. *See id.* at 1305.

30. *See Yancey v. Apfel*, 145 F.3d 106, 111-12 (2d Cir. 1998).

31. 145 F.3d 106 (2d Cir. 1998).

32. *See id.* at 114.

33. *See, e.g., Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir. 1984) (finding that the ALJ denied due process after the ALJ failed to allow the claimant to challenge evidence on which the ALJ based his ruling); *Treadwell v. Schweiker*, 698 F.2d 137, 144 (2d Cir. 1983) (holding that basing a decision on uncorroborated hearsay evidence and the failure to grant and enforce a subpoena violated the claimant's due process rights); *Gullo v. Califano*, 609 F.2d 649, 650 (2d Cir. 1979) (holding that the ALJ's reliance on a post-hearing report without authorizing the claimant to examine or challenge that report violated due process).

Circuit.<sup>34</sup> The *Yancey* panel deemed that the issue was not explicitly at issue in earlier cases.

Asserting that she had an absolute right to subpoena a reporting physician,<sup>35</sup> the *Yancey* claimant further contended that the particular circumstances of her case, including the facts that contradictory medical evidence was presented and that diagnosing systemic lupus erythematosus (SLE) is difficult and complex, warranted cross-examination.<sup>36</sup> The Second Circuit, however, gave the claimant's assertions short shrift; the panel conjectured that cross-examination would have elicited only "redundant information."<sup>37</sup>

In ruling against the claimant, the panel echoed the Sixth Circuit's interpretation of *Perales*'s "right to subpoena" rule by reiterating that the Supreme Court failed to address with specificity the issue of whether this "right" was limited or absolute.<sup>38</sup> The *Yancey* panel then proceeded to draw on the Supreme Court's analytical framework for measuring procedural due process, as set forth post-*Perales* in *Mathews v. Eldridge*,<sup>39</sup> and expanded its view of *Mathews* by adopting a rule against establishing an absolute right to subpoena physicians.<sup>40</sup>

Utilizing the *Mathews* analytical framework, the Second Circuit in *Yancey*, similar to the Sixth Circuit in *Flatford*, concluded that cross-examination of reporting physicians is not crucial to the fairness and accuracy of the ALJ's decision.<sup>41</sup> Furthermore, the panel maintained that the danger of inaccurate medical information or biased opinions was not great enough in this case to suggest that the claimant would be denied benefits wrongly without the chance to cross-examine the doctor.<sup>42</sup> Given the fact that the reporting

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34. See *Yancey*, 145 F.3d at 111.

35. See *id.*

36. See *id.* at 113.

37. *Id.* at 113.

38. See *id.* at 112.

39. 424 U.S. 319, 335 (1976). The Supreme Court established three factors to determine whether an administrative procedure is constitutionally sufficient: (1) the nature and magnitude of private interests affected; (2) the "risk of an erroneous deprivation of such interest" and the "value, if any, of additional or substitute procedural safeguards;" and (3) whether the "additional or substitute procedural requirement" would financially or administratively burden the government. *Id.*, quoted in *Yancey*, 145 F.3d at 112 n.8.

40. See *Yancey*, 145 F.3d at 113.

41. The panel maintained that the nonadversarial nature of SSA adjudications reduces the need for cross-examination, which is essential to fairness in adversarial settings. See *id.*

42. See *id.*



physician failed to find that Yancey suffered from SLE, the panel concluded that the doctor's testimony and cross-examination would have been redundant and of no use to the ALJ in making his determination.<sup>43</sup>

In considering whether due process mandated the cross-examination of reporting physicians, the *Yancey* panel enveloped its decision within a framework that focused on whether the Commissioner's decision was justified by substantial evidence in the record or by an empirical probing of the relationship between the *Mathews* factors and the *Yancey* facts. The panel emphasized that courts should not reverse a ruling "[w]here an administrative decision rests on adequate findings sustained by evidence having rational probative force."<sup>44</sup>

If granting a subpoena and cross-examination would have led to an altered assessment of whether substantial evidence justified the Commissioner's conclusion, then denial of cross-examination could have been construed as denial of due process. However, the panel found that the record indicated no reason for determining a lack of substantial evidence; the claimant had no proof that cross-examination would have produced testimony transcending "redundant information."<sup>45</sup>

### III. THE FIFTH CIRCUIT'S RULING THAT CROSS-EXAMINATION IS A COMPONENT OF DUE PROCESS

In *Lidy v. Sullivan*,<sup>46</sup> the Fifth Circuit issued the most definitive and dispositive ruling regarding the right to cross-examination. The panel, comprised of Judges Gee, Smith, and Weiner, asserted unanimously that the "better reading" of the Supreme Court's *Perales* language is that it grants claimants an absolute right to subpoena reporting physicians.<sup>47</sup>

In *Lidy*, the SSA argued that the *Perales* decision limits the claimant's right to subpoena and cross-examine reporting physicians, and used the SSA's regulations to bolster this argument.<sup>48</sup>

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43. See *id.*

44. *Id.* at 111.

45. *Id.* at 114.

46. 911 F. 2d 1075 (5th Cir. 1990).

47. See *id.* at 1077.

48. See *id.* (citing 20 C.F.R. § 404. 950(d), which authorizes the ALJ to decide whether the requested cross-examination is "reasonably necessary for the full presentation of the case").

To support this interpretation, the SSA relied on language from *Perales* that expressed a concern about “the cost of providing live medical testimony . . . where need has not been demonstrated by a request for a subpoena.”<sup>49</sup>

The panel, however, rejected the SSA’s interpretation of this language and maintained that the language is unclear as to whether the request should purport an adequate showing of need — the interpretation undoubtedly supported by the Secretary — or the mere “filing of a request *ipso facto* constitutes a demonstration of need.”<sup>50</sup> Instead, the *Lidy* panel maintained that the Supreme Court’s reference to the “right to subpoena” confers the right to cross-examine upon the claimant if the claimant requests a subpoena.<sup>51</sup> As a result, the court concluded that the claimant need not show whether cross-examination was “reasonably necessary for the full presentation of the case,” as the SSA’s regulation provided.<sup>52</sup> Thus, according to the Fifth Circuit’s interpretation of *Perales*, the claimant has an absolute right to have her request granted.<sup>53</sup>

The Fifth Circuit panel added frosting and controversy to its cake by remarking in conclusion, “We are persuaded, as well, by the fact that all of the circuit courts of appeals that have addressed this issue read *Perales* as conferring an absolute right to subpoena a reporting physician.”<sup>54</sup> Although the other circuits’ decisions on

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49. *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 406 (1971)).

50. *Id.*

51. *See id.* (citing *Perales*, 402 U.S. at 402).

52. *Id.*

53. *See id.*

54. *Id.* (citing *Coffin v. Sullivan*, 895 F.2d 1206 (8th Cir. 1990); *Wallace v. Bowen*, 869 F.2d 187 (3d Cir. 1988); *Townley v. Heckler*, 748 F.2d 109 (2d Cir. 1984); *Figuroa v. Secretary*, 585 F.2d 351 (1st Cir. 1978)). The panel’s evaluation of the *Wallace* case was overtly challenged as erroneous by then-Solicitor General Kenneth Starr in the government’s petition for certiorari. *See* Petition for Writ of Certiorari at 13 n.5, *Lidy v. Sullivan*, 500 U.S. 959 (1991) (No. 90-1344). The Solicitor General was partially correct in that the *Wallace* panel recognized that compliance with the SSA’s regulation was a necessary subject of inquiry by the courts. *See Wallace*, 869 F.2d at 191. The ruling and comments of the panel, however, overtly contradicted the SSA’s stance that it legitimately denied cross-examination in the case. *See id.* at 194. The panel ordered the Secretary to afford the claimant the right to cross-examine the physicians whose opinions had been received post-hearing. The court added: “We disagree with the Secretary’s evaluation of the utility of cross-examination in such a situation. Effective cross-examination could reveal what evidence the physician considered or failed to consider in formulating his or her conclusions . . . and whether there are any qualifications to the physician’s conclusions.” *Id.* at 192. Thus, while recognizing that cross-examination is properly contingent on being necessary to the full presentation of the case, the panel ruled that the threshold of necessity perceived

which the *Lidy* panel relied were by no means incompatible with its ruling, the *Lidy* panel was distinctive in insisting that compliance with the SSA's regulation should not be examined at all by the court because cross-examination is explicitly an absolute right.<sup>55</sup>

To no avail, then-Solicitor General Kenneth Starr and his staff made elaborate legal and policy arguments for the Supreme Court to grant certiorari. The fifteen-page petition for certiorari argued that the issues at stake were of substantial significance to the proper administration of the federal disability benefits program and to federal administrative actions generally.<sup>56</sup> According to the Solicitor General, the Fifth Circuit's holding: (1) "threatens to impose enormous financial and procedural burdens on a program under which millions of claims are filed every year;"<sup>57</sup> (2) "failed to apply the three-part analysis of due process requirements articulated by this Court, and applied by the Court to Social Security Act eligibility determinations, *Mathews v. Eldridge*;"<sup>58</sup> (3) "failed to consider whether an 'absolute right' to subpoena and examine reporting physicians would materially alter the risk of erroneous eligibility determinations and whether such a right would unduly and inefficiently burden the administrative process;"<sup>59</sup> (4) "concluded that the due process right of a disability applicant to subpoena and examine reporting physicians had been established . . . as a direct holding in its decision in *Richardson v. Perales*," and "misapplied this Court's decisions and has created a conflict with the decisions of other courts of appeals;"<sup>60</sup> (5) "erroneously cited *Wallace v. Bowen* as support for its holding;"<sup>61</sup> (6) "mistakenly read *Perales* to require that subpoenas be granted without a demonstration of 'need';"<sup>62</sup> and (7) "will inevitably cause confusion and inefficiency

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by the district court did not coincide with that of the SSA and that in this instance at least, "the ALJ must afford the claimant not only an opportunity to comment and present evidence but also an opportunity to cross-examine the authors." *Id.* at 193.

55. See *Lidy*, 911 F.2d at 1077.

56. See Petition for Writ of Certiorari at 7, *Lidy* (No. 90-1344).

57. *Id.*

58. *Id.*

59. *Id.* at 7-8.

60. *Id.* at 8.

61. *Id.* at 13 n.5. In *Wallace* the Third Circuit held that due process requires that ALJs allow subpoenas "when cross-examination is necessary to the full presentation of the case." *Wallace v. Bowen*, 869 F.2d 187, 193 (3d Cir. 1988).

62. See Petition for Writ of Certiorari at 13, *Lidy* (No. 90-1344).

in the national administration of the federal benefits program" and "should therefore be resolved by this Court."<sup>63</sup>

The Supreme Court denied certiorari in the *Lidy* case on June 3, 1991.<sup>64</sup> Effective December 31, 1991, the SSA agreed to accept the Fifth Circuit's ruling on cross-examination in all cases issued out of that circuit.<sup>65</sup>

#### IV. THE CONSEQUENCES OF AGENCY ACQUIESCENCE IN THE FIFTH CIRCUIT'S RULING?

The predictions of draconian consequences that inevitably will ensue if cross-examination of physicians is upheld as an absolute right are puzzling.<sup>66</sup> I asked a sample of social security practitioners in the Fifth Circuit to comment on the effects of the SSA's acquiescence in the Fifth Circuit's *Lidy* ruling. The sample was not scientifically drawn. Instead, I randomly selected fifteen practitioners who have varying ranges of experience in the social security context and with whom or whose work I had no prior knowledge.

I addressed the following letter to the selected practitioners:

Dear:

As part of an ongoing research project regarding the right to subpoena an examining physician for cross-examination purposes in social security cases, one of my students came across Social Security Acquiescence Ruling 91-(5) which states that when a claimant requests a subpoena for cross-examination purposes, the adjudicator must issue the subpoena. See 56 Fed. Reg. 67,625. This ruling which is limited

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63. *Id.* at 14.

64. See *Sullivan v. Lidy*, 500 U.S. 959, 959 (1991). Justice White cast one vote for certiorari.

65. Notice of Acquiescence, 56 Fed. Reg. 67,625, 67,625 (1991). The SSA specified that this ruling applies only to cases involving claimants for disability insurance benefits and/or supplemental security income payments based on disability who reside in Louisiana, Mississippi, or Texas at the time of the proceedings at the disability hearing, ALJ, or Appeals Council levels. In such cases, when a claimant requests that a subpoena be issued for the purpose of cross-examining an examining physician prior to the closing of the record, the adjudicator must issue the subpoena. See *id.*

66. Without citing any empirical evidence, the Sixth Circuit in *Flatford* asserted that a consequence of an absolute right to subpoena would be that "the number of physicians willing to provide medical advice to the administrative law judge would drop." *Flatford v. Chater*, 93 F.3d 1296, 1306 (6th Cir. 1996). The Second Circuit echoed the Sixth Circuit and concluded that "practical concerns" about financial and administrative burdens "strongly militate against . . . establishing an absolute right to subpoena reporting physicians." *Yancey v. Apfel*, 145 F.3d 106, 113 (2d Cir. 1998).

to the Fifth Circuit is contrary to the SSA's policy elsewhere that a claimant's right to subpoena is qualified. See C.F.R. §§ 404.950(d)(1)(2).

In order to better understand what kind of impact this ruling has had in the Fifth Circuit, I would greatly appreciate any comments or reactions you may have regarding this ruling. I am particularly interested in any thoughts you may have on the following issues:

1. The chilling effect, if any, on the number of physicians willing to provide medical advice to the ALJ due to the possibility of being subject to cross-examination as suggested by Judge Martin in *Flatford v. Chater*, 93 F.3d 1296, 1306 (6th Cir. 1996); and
2. The effectiveness of cross-examination in social security cases.

I would be most grateful for any feedback regarding the above mentioned issues. Thank you in advance for your help.

Sincerely Yours,

I received seven responses to this letter, six of which are quoted below. The seventh was unresponsive. Although certainly not dispositive of the issue, none of the respondents perceived any chilling effect on doctors' willingness to participate or any adverse effects on SSA or ALJ efficacy. Cross-examination was not deemed necessary or desirable in all cases; it was valuable for enhancing specificity in the record and for accessing, confronting, or excluding nebulous or biased reports.

Typical of the responses were these by practitioners in Texas and Louisiana, to which I assigned numbers to preserve confidentiality.

1. I spoke with Administrative Law Judge \_\_\_\_\_, as to the experience the ALJs in the \_\_\_\_\_ Office have had in regard to subpoenas of consultative examiners. He indicated that between ten percent and fifteen percent of the cases will have a subpoena issued for the consultative examiner to be cross-examined.

I have perpetuated a social security practice for a number of years and have found that the same doctors appear from time to time at the different hearings. I have found that the courts are much more likely to look closely at the regular treating physi-

cians who have had hands-on care of the claimant, along with test results and laboratory findings over a period of years rather than the one-time examining physician's findings. I find all too often that the examining physicians hired by the State Disability Determination Division will be requested to give their opinion; however, they are not provided with the money to do necessary X-rays, MRIs and other objective tests which would help the doctors to get a better determination of just what is going on with the claimant's impairments. Also, it is very difficult, it not impossible, to learn just which of the medical records have been sent to the consultative examiner prior to the examination to give him information to predicate the examination he is giving.

2. The Social Security Administration, through the various state Disability Determination Services, procures "consultative" medical examiners of, I would guess, a majority of claimants. ALJs also employ "medical advisors" who typically appear at the hearing, listen to the testimony and offer opinions regarding the listings and medical assessments of mental and physical limitations. The former groups are primarily the target of a claimant's subpoena.

I do not believe subpoena power in the Office of Hearing and Appeals (OHA), where my practice is centered, has a chilling effect on their willingness to conduct examinations for the agency. Acutally, OHA has no real mechanism for the issuance of a subpoena. The ALJ simply calls the doctor and politely asks him to appear at the hearing. I have requested the appearance of examining physicians on several occasions because the interpretation of their medical assessments could be the difference between and award or denial of benefits. I generally assume an ALJ will interpret a vague medical assessment to deny benefits. The examining physicians want Social Security's business and, I believe, do better examinations and write clearer reports when they may have to account for them in court.

3. First, I believe there has been no "chilling effect" on the willingness of physicians to perform disability examinations for the Social Security Administration, as a result of this ruling. I have

been practicing Social Security disability law for more than twenty years, and physicians who are willing to perform consultative examinations for the government in Social Security disability cases, are more plentiful now than they ever have been in the past. Of the many factors that influence physicians' willingness to participate in this system, the impact of the *Lidy* decision and Social Security Agency Regulation 91-(5) is so small as to be negligible. I would bet that subpoenas are requested in well under one percent of all cases heard by ALJs in the Dallas, Fort Worth and Houston areas where I practice, and probably throughout the Fifth Circuit. Even when we do request subpoenas, they are rarely issued, despite *Lidy*, for a variety of reasons, e.g. the ALJ may have decided on his own that the opinion of the doctor for who a subpoena was requested is not reliable. Also, subpoenas issued by ALJs are not enforceable, and it is time consuming and cumbersome to obtain an enforceable subpoena. It may be more expeditious to simply obtain another examination.

In cases where we have succeeded in obtaining cross-examination of a consultative physician, the outcomes have varied. We have had a number of cases in which physicians who had submitted written reports that appeared adverse to our clients, ended up giving testimony that was extremely helpful to our cases. In other cases, the cross-examination did not alter an adverse outcome. Of course, there are other ways to measure "effectiveness of cross-examination" aside from whether it alters the outcome of the decision. The Social Security disability adjudication system is a system of "mass justice" in which the economics of providing consultative examination services to the government sometimes results in abbreviated, shoddy examinations and poorly written reports. Some physicians become so dependent upon the government for sending them large numbers of these cases that they may lose their objectivity altogether.

4. I have practiced social security law for the past eight years, almost exclusively for the past five years. In my experience an examining physician is

rarely cross-examined. On those few occasions where I have requested that the examining physician be subpoenaed, the physician greatly resisted the subpoena to the point where the ALJ struck the report from the record and scheduled a new consultative examination. Obviously I feel that all practitioners use the subpoena power very limitedly and only where an examining physician's report is so contrary to the remaining evidence of record that it has not had a chilling effect on physicians.

5. I customarily invoke the rule of the *Lidy* Decision for two reasons:

1. To block the use by the Social Security Administration of evidence provided by a particular examining physician.
2. To seek to exclude the reports of consulting physicians whose reports demonstrate significant bias against social security claimants.

With respect to your question about the "chilling effect" on physicians, I do not believe there is one. In those instances where subpoenas are issued in my cases, the subpoenas are routinely ignored by the physicians. Because of the weak and cumbersome enforcement process, the only effect of the subpoena, as a practical matter, is to furnish the grounds for a motion to exclude the doctor's report or records. This motion is usually, although not uniformly, granted.

In sum, in my practice the physician subpoena is usually a tactical tool, which is issued with the expectation that the physician actually will not appear and testify.

6. First, I have no information whatsoever about any chilling effect on the number of physicians willing to provide medical advice to the ALJ. It appears to me that a more important factor leading to a low number of Disability Determination Services physicians is the perceived "small fee" paid to physicians and psychologists. Most medical experts testifying at my clients' hearing are retired physicians.

Second, the effectiveness of my cross-examination of the testifying doctors at the hearing seems directly related to the ALJ's willingness to let me do a complete cross-examination. It seems that many of the



newly hired ALJs view the medical experts and/or consultants as someone they are supposed to protect from my questions. Other, more experienced ALJs, let me do whatever cross-examination I feel is appropriate to the case.

From my perspective, the Fifth Circuit has turned from an occasionally claimant oriented court in the 1960s to an almost wholly defense oriented court. It rarely, if ever, finds in favor of a claimant.

Lastly, my rare experiences with requesting a subpoena from an ALJ have produced variable results. Mostly the ALJs will issue the subpoena. Sometimes they ignore my request. When they ignore my request, about half the time I interpret this to mean that they are leaning toward finding the client disabled and do not want to go through the bother of subpoenaing a consulting physician, and the client usually wins.

These responses strongly suggest that the negative conjectures shared by the Second and Sixth Circuits and the Solicitor General regarding the effects of allowing physicians cross-examination as an absolute right should not be admitted as credible unless and until clear and convincing empirical support can be found in the record to validate them.<sup>67</sup>

The *Mathews* factors<sup>68</sup> for determining the dimensions of due process required in particular cases should not be transformed into instruments of hyperbole and exaggeration. They warrant and require concrete factual data as measurements of the risks of erroneous deprivations of claimants' interests and of the fiscal and administrative burdens on governmental interests. In addition, there should be continuing awareness that governmental interests extend beyond efficiency and integrity. As the Supreme Court pointed out in *Goldberg v. Kelly*,<sup>69</sup> "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."<sup>70</sup> *Mathews* did not dispute *Goldberg's* point that affording people their rights and entitle-

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67. These responses are by no means conclusive enough to prove that the SSA's acquiescence of *Lidy* produced no chilling effects on doctor's participation, no enormous escalation of the financial costs, and no incursions on efficient administration of the system.

68. See *supra* note 39.

69. 397 U.S. 254 (1970).

70. *Id.* at 264-65.

ments are means by which "important governmental interests are promoted."<sup>71</sup> Indeed, *Mathews* arguably alluded to these governmental interests in affording people their rights and entitlements in specifying "the function involved" as a component of governmental interest.<sup>72</sup>

#### V. SHOULD THE "NONADVERSARIAL" STATUS OF SOCIAL SECURITY HEARINGS AFFECT THE AVAILABILITY OF CROSS-EXAMINATION?

In *Perales*, Justice Blackmun reasoned that the nonadversarial nature of social security proceedings warrant greater informality and flexibility in the presentation and evaluation of evidence as support for accepting hearing evidence of physicians as substantial evidence when the claimant failed to subpoena the reporting physician for cross-examination.<sup>73</sup> Justice Blackmun maintained that typical reporting physicians have no interest in the outcome of the proceedings beyond professional curiosity.<sup>74</sup> Only Justice Douglas, in dissent, echoed the challenge by *Perales*' counsel to the SSA's claim of nonadversariality.<sup>75</sup> *Perales*'s counsel argued that the government is being unrealistic when it maintains that a disability hearing is not adversarial; in actuality, the presiding officer gathers evidence, decides which evidence to present, and seeks to strengthen the government's case as much as possible.<sup>76</sup> Justice Douglas scoffed at the fairness of the SSA's practices in using "circuit-riding" doctors' claims without submitting them to cross-examination.<sup>77</sup>

To condition the grant or denial of cross-examination on whether or not proceedings may aptly be termed "nonadversarial" rewards form over substance. The rationale for cross-examination that Dean Wigmore phrased with such eloquence and grace depends

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71. *Id.* at 264.

72. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (citing *Goldberg*, 397 U.S. at 263-66).

73. *See Richardson v. Perales*, 402 U.S. 389, 402 (1971).

74. Justice Blackmun described the typical medical reports as "routing, standard and unbiased," *id.* at 404, and maintained that the "specter of questionable credibility and veracity is not present," *id.* at 407.

75. *See id.* (Douglas, J., dissenting).

76. *See* Brief for Respondent at 27, *Richardson v. Perales*, 402 U.S. 389 (1971) (No. 108).

77. *See Perales*, 402 U.S. at 414 (Douglas, J., dissenting).

not at all on the adversariness of the forum, but the substance of its reliance and reliability for credible evidence. As Wigmore stated:

For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength and lengthening experience.<sup>78</sup>

To predict with certainty what gaps or gaffes cross-examination may identify would be a fruitless or fictional assignment. As Roy Reardon makes clear: "Conducting an effective cross-examination always involves instantaneous interplay with the witness. It is therefore impossible to read a cross-examination out of a 'black loose-leaf book' or to adhere rigidly to a formal outline. Spontaneity is essential . . ." <sup>79</sup> Granted, there may be and are occasions when counsel abuse the right to cross-examination by endless, repetitive questions or efforts to substitute brow-beating and intimidation for inquiry. That is when presiding officers have the authority and duty to call a halt. But to require a claimant to prove, as a condition of obtaining a subpoena, that cross-examination will assure production of evidence not available by interrogatories or other written inquiries destroys cross-examination's primacy as a safeguard of accuracy. The hurdles blocking access to cross-examination serve as shields against physicians' accountability for the specificity and validity of their reports.

The Sixth and Second Circuit panels maintained that the SSA appropriately placed the discretion to grant or deny subpoenas and cross-examinations in the hands of SSA's ALJs and that ALJ decisions should be reversed in such matters only for abuse of discretion.<sup>80</sup> The exercise of discretion requires independence of SSA decisional directives, but any assumption of ALJ freedom from SSA decisional direction needs reexamination today in light of con-

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78. WIGMORE ON EVIDENCE § 1367 (3d ed. 1940).

79. Roy L. Reardon, *Cross-Examination "To Sin or Not to Sin,"* 25 LITIG. 30 (1998), available in WESTLAW, 25 NO. 1 LITIG. 30, at \*2.

80. See *Yancey v. Apfel*, 145 F.3d 106 (2d Cir. 1998); *Flatford v. Chater*, 93 F.3d 1296 (6th Cir. 1996).

tinuing assertion of the SSA's "managerial" authority, which includes prescriptions for decision making.

The SSA has declared, and not yet repudiated, that ALJs must adhere in their decisions to the SSA's policies, notwithstanding court decisions to the contrary. Unless SSA management decides to acquiesce in a court's holding (as the SSA did after the Supreme court denied certiorari in the *Lidy* holding of the Fifth Circuit), ALJ decision making is bound by SSA's policies and SSA's interpretation of the applicable law.<sup>81</sup> By insisting explicitly that "[a]n ALJ is bound to follow SSA policy even if, in the ALJ's opinion, the policy is contrary to law,"<sup>82</sup> the SSA denigrates the decisional integrity and commitment of the rule of law and subordinates their professional judgement to the politically fueled policies of SSA management. ALJs who might have the temerity to adhere to the court's ruling that contravene SSA policies are warned by the General Counsel that "[a]long with the authority to set these policies, of course, goes the authority to ensure that these policies are carried out and, where appropriate, i.e. where a factual basis exists, to discipline ALJs for violation of such policies."<sup>83</sup>

Given rulings by the circuit courts of appeals affirming that administrative agencies "are required to abide by the law of this Circuit in matters arising within the jurisdiction of this Circuit until and unless it is changed by this court or reversed by the Supreme Court of the United States,"<sup>84</sup> it is difficult to avoid labeling the General Counsel's instruction to ALJs as a requirement to engage in contempt of court. If the SSA believes that its policy choices can, with impunity, challenge and trump circuit court rulings, it is disingenuous at best for it to argue concomitantly that its mode of operation is nonadversarial and, hence, is entitled to exercise greater flexibility and informality in decision making. *Vis a vis* circuit court judges, its own ALJs, and claimants petitioning for benefits, the SSA is about as nonadversarial as whiskey is

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81. See Social Security Administration General Counsel Memorandum, Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges 5-6 (Jan. 28, 1997) (on file with author).

82. *Id.*

83. *Id.* at 18.

84. *Industrial TurnAround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) (quoting *United States Dep't. of Energy v. FLRA*, 106 F.3d 1155, 1165 (4th Cir. 1997) (Lultig, J., concurring)); see also *Iowa Util. Bd. v. FCC*, 135 F.3d 535, 540 (8th Cir. 1998) (holding that the FCC must abide by the Eighth Circuit's rulings, reasoning that the FCC is not an equal of the court and the court has the ultimate duty to determine what the law is).

nonalcoholic.<sup>85</sup> The time is ripe to reaffirm that the right to cross-examination is an integral component of fairness in constitutional and administrative adjudications. This right should not be truncated or compromised by meretricious pretenses of nonadversariality.

## VI. CONCLUSION

Legal education teaches us to be wary of absolutes such as “always” and “never.” Notwithstanding my preference for cross-examination of physicians as an absolute right, I recognize the potential for abuse at the fringe through needless and wasteful duplication or pedantry. Consequently, I could support a reformulation of the SSA regulation on cross-examination that affirms and asserts the right of claimants to cross-examine physicians but also authorizes ALJs, for good cause found, to suspend or deny cross-examination where clear and convincing evidence in the record warrants the conclusion that the testimony sought is or would be irrelevant, dysfunctional, or unduly repetitive. The important difference between the present regulation and my suggestion lies in the burden of proof. Whereas the SSA places the claimant in the position of a mendicant who must prove to the SSA’s satisfaction that the cross-examination is necessary, my suggestion would recognize the claimant’s right to cross-examine the reporting physician unless the clear and convincing threshold of proof to the contrary has been met.

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85. I have suggested steps toward a collegial, rather than the present hierarchical approach, in the SSA’s relationships with ALJs. See Victor G. Rosenblum, *Toward Heightening Impartiality in Social Security Agency Proceedings Involving Administrative Law Judges*, 18 J. NAT’L ASS’N ALJ’S 58, 68-71 (1998). For a searing critique of SSA’s “unusually informal administrative model,” see Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997).